JB Precision Moulding Industries Sdn Bhd (in liquidation) v Asia Commercial Finance (M) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — ORIGINATING MOTION NO 16 OF 1993
JAMES FOONG J
8 DECEMBER 1993

Companies and Corporations — *Winding up — Equipment leasing agreement — Memorandum of security deposit for due performance of lease agreement — Memorandum of security deposit not registered with Registrar of Companies as charge under s 108 of the Companies Act 1965 — Whether security void against liquidator — Companies Act 1965 s 108*

Companies and Corporations — *Winding up — Fraudulent preference — Set-off made three years after winding-up order — Whether respondent 'secured creditor' so that set-off by them of sum under memorandum of deposit undue preferential payment to creditors under s 293 of the Companies Act 1965 — Companies Act 1965 s 293*

Words and Phrases — *'Secured creditor'*

Words and Phrases — *'Lien'*

The applicant company ('the applicant') entered into an equipment leasing agreement ('the agreement') with the respondent. The applicant deposited with the respondent a sum of RM26,691 as security for due performance by the applicant of the terms and conditions stated in the agreement. The deposit of this sum was evidenced by a memorandum of security deposit ('the memorandum of deposit'). The applicant was later wound up and a liquidator appointed. The liquidator then demanded from the respondent the return of the deposit of RM26,691. This was resisted by the respondent on the grounds that the applicant had breached the terms and conditions of the agreement and, the sum of RM26,691 had been utilized by them to set off an outstanding debt due and owing by the applicant to the respondent.

This was an application by the liquidator of the applicant for the refund of the sum of RM26,691 together with interest and costs from the respondent. The issues before the court were: (i) whether non-registration of the memorandum of deposit as a charge under s 108 of the Companies Act 1965 ('the Act') by the respondent with the Registrar of Companies caused the security to be void against the liquidator; and (ii) whether the respondent was a 'secured creditor' so that the set-off by them of the sum of RM26,691 under the memorandum of deposit was not an undue preferential payment to creditors under s 293 of the Act.

Held, allowing the application:

(1) By a statutory amendment which took effect on 25 September 1993, a new s 108(3)(k) was added to the Act which declared that 'a charge on the credit balance of the company in any deposit account requires registration with the Registrar of Companies in order not to be void against the liquidator'. Undoubtedly, the memorandum of deposit in this case fell squarely within this category of charges. Nevertheless, this amendment would not affect transactions that took place before the effective date of the amendment. Therefore, the new s 108(3)(k) of the Act should not apply to the circumstances of this case as the transaction was done before the amendment came into effect. It was therefore not void against the liquidator of the applicant.

(2) There were no elements of a debt owed by the applicant to the respondent at the time when the memorandum of deposit was executed. Therefore, the respondent could not be holding the memorandum of deposit as a security for a debt to qualify them as 'secured creditors'. As the respondent was not a 'secured creditor', the set-off made three years after this winding-up order must be void under s 223 of the Act as it was made after the commencement of the winding up of the applicant. It was also void under s 293 of the Act for undue preferential payment to creditors. The sum must now be returned to the liquidator for his necessary action.

[Bahasa Malaysia summary

Syarikat pemohon ('pemohon itu') telah mengikat suatu perjanjian penyewaan jentera ('perjanjian itu') dengan responden. Pemohon telah mendepositkan bersama responden sejumlah sebanyak RM26,691 sebagai cagaran untuk pelaksanaan terma dan syarat yang telah dinyatakan di dalam perjanjian itu oleh pemohon. Deposit jumlah itu ditunjukkan oleh suatu memorandum deposit cagaran ('memorandum deposit itu'). Pemohon kemudiannya telah digulung dan seorang penyelesai telah dilantik. Penyelesai itu telah meminta supaya responden memulangkan deposit sebanyak RM26,691 itu. Ini dibantah oleh responden atas alasan bahawa pemohon telah melanggar terma dan syarat perjanjian itu dan, jumlah RM26,691 itu telah digunakan oleh mereka untuk mengimbangi hutang yang masih belum dibayar dan yang masih dihutang oleh pemohon kepada responden.

Ini merupakan suatu permohonan oleh penyelesai pemohon itu untuk mendapat balik jumlah RM26,691 bersama dengan faedah dan kos daripada responden. Isu-isu di hadapan mahkamah adalah: (i) sama ada memorandum deposit itu yang tidak didaftarkan sebagai suatu gadaian di bawah s 108 Akta Syarikat 1965 ('Akta itu') oleh responden dengan Pendaftar Syarikat telah menyebabkan cagaran itu tidak sah terhadap penyelesai itu; dan (ii) sama ada responden merupakan

'pemiutang bercagar' iaitu pengimbangan oleh mereka bagi jumlah RM26,691 di bawah memorandum deposit itu tidak merupakan suatu pembayaran keutamaan yang tidak wajar kepada pemiutang di bawah s 293 Akta itu.

Diputuskan, membenarkan permohonan itu:

(1) Melalui suatu pindaan statutori yang mula berkuatkuasa pada 25 September 1993, suatu seksyen baru, s 108(3)(k), telah ditambah kepada Akta itu yang menyatakan bahawa 'a charge on the credit balance of the company in any deposit account requires registration with the Registrar of Companies in order not to be void against the liquidator'. Tidak boleh dipertikaikan bahawa di dalam kes ini, memorandum deposit itu termasuk di dalam kategori kes gadaian ini. Walau bagaimanapun, pindaan ini tidak melibatkan transaksi yang berlaku sebelum tarikh pindaan itu mula berkuatkuasa. Oleh itu, seksyen baru s 108(3)(k) Akta itu tidak sepatutnya terpakai kepada keadaan kes ini kerana transaksi itu telah berlaku sebelum pindaan itu mula berkuatkuasa. Oleh itu, ia bukanlah tidak sah terhadap penyelesai pemohon itu.

(2) Tidak terdapat sebarang unsur yang menunjukkan bahawa pemohon berhutang kepada responden pada masa memorandum deposit itu disempurnakan. Oleh itu, responden tidak boleh menggunakan memorandum deposit itu sebagai cagaran untuk suatu hutang supaya menjadikan mereka 'pemiutang bercagar'. Oleh kerana responden bukan 'pemiutang bercagar', pengimbangan yang telah dibuat tiga tahun selepas perintah penggulungan semestinya tidak sah di bawah s 223 Akta itu kerana ianya dibuat selepas penggulungan pemohon dimulakan. Ianya juga tidak sah di bawah s 293 Akta itu kerana ia merupakan suatu pembayaran keutamaan yang tidak wajar kepada pemiutang. Jumlah itu sekarang mesti kembalikan kepada penyelesai untuk tindakannya yang perlu.]

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02–750–93.]

Notes

For cases on fraudulent preference, see 3 *Mallal's Digest* (4th Ed) paras 247–248.

Cases referred to

1 *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449 (refd)

2 *Agimal Industries Sdn Bhd v United Malayan Banking Corp Bhd & Anor* [1993] 2 AMR 34 (distd)

Legislation referred to

Bankruptcy Act 1967 s 2

Companies Act 1965 s 108(3)(k)

A *Ong Ban Chai* (*Ong Ban Chai & Co*) for the applicant.
A Navamani (*TS Chong & Co*) for the respondent.

James Foong J: This is an application by the liquidator of the applicant company for the refund of a sum of RM26,691 together with interest and costs from the respondent.

B The facts of this case are rather straightforward. The applicant company had on 16 August 1988 entered into an equipment leasing agreement (which I shall refer to as 'the lease agreement') with the respondent for a plastic moulding machine. As part of the transaction, the applicant company deposited with the respondent a sum of RM26,691 as security for the due C performance by the applicant company of the terms and conditions stated in the said lease agreement. The deposit of this sum was evidenced by a memorandum of security deposit (which I shall refer to it as 'the memorandum of deposit').

On 4 April 1990, the applicant company was wound up and a liquidator D appointed. The liquidator then demanded from the respondent for the return of the deposit of RM26,691. This was resisted by the respondent on the grounds that the applicant company had breached the terms and conditions of the lease agreement and, the sum of RM26,691 had been utilized by them on 4 August 1993 to set off an outstanding debt due and owing by the applicant company to the respondent.

E In this application before this court, counsel for the liquidator argued that the respondent, not being a secured creditor, had to return the deposit sum for distribution under s 292 of the Companies Act 1965 ('the Act'). The respondent' action to set-off the said sum amounts to an undue preferential treatment of creditors and therefore void under s 293 of the Act.

F Further, as the memorandum of deposit was not registered as a charge under s 108 of the Act with the Registrar of Companies, this security is void against the liquidator of the applicant company.

In reply, respondent's counsel argued that the respondent was a 'secured creditor' and, as a 'secured creditor' the winding-up order made against the G applicant company did not affect their rights to realize or deal with the security under the memorandum of deposit. Further, under the pre-amendment to s 108 of the Act, there was no statutory requirement for the respondent to register the memorandum of deposit as a charge with the Registrar of Companies. The memorandum of deposit is therefore not void against the liquidator.

H I shall first deal with the issue of whether non-registration of the memorandum of deposit by the respondent with the Registrar of Companies would cause this security to be void against the liquidator.

Before 25 September 1993, a transaction such as the one stated in the memorandum of deposit does not fall within any of the categories of I 'charges' that require registration with the Registrar of Companies in order not to be void against the liquidator. However, by a statutory amendment which took effect on 25 September 1993, a new provision — s 108(3)(k) was added to the Act. This new section declares that 'a charge on the credit balance of the company in any deposit account requires registration with

the Registrar of Companies in order not to be void against the liquidator'. It is an undoubted fact that the memorandum of deposit in this case now falls squarely within this category of charges. Nevertheless, I accept the contention of the respondent's counsel that this amendment should not affect transactions that took place before the effective date of the amendment. It is trite law that any Act of Parliament should not be applicable retrospectively unless otherwise expressly stated. Such an express provision that it should be retrospective is absent in the Amendment Act to s 108 of the Act. This being the case, I find that this new s 108(3)(k) of the Act should not apply to the circumstances of this case as the transaction was done before the amendment came into effect. It is therefore not void against the liquidator of the applicant company.

Now this court shall deal with the issue of whether the respondent is a 'secured creditor' so that the set-off by them of the sum of RM26,691 under the memorandum of deposit is not an undue preferential payment to creditors under s 293 of the Act.

The term 'secured creditor' is not defined under the Act but is included in the definition section (s 2) of the Bankruptcy Act 1967. By virtue of s 4(1) of the Civil Law Act 1956 and the principles as laid down in the Supreme Court decision in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors*,[1] the provisions of the Bankruptcy Act 1967 can similarly apply to winding up of companies. Section 2 of the Bankruptcy Act 1967 defines 'secured creditor' as:

> ... a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment; ...

Learned counsel for the respondent submitted that since the respondent was in possession of the memorandum of deposit, the respondent had a lien over the property of the applicant company thus qualifying them to be 'secured creditor'.

A 'lien' is described in the *Osborne Law Dictionary* as 'the right to hold the property of another as security for the performance of an obligation'. This, to my mind, is a wide and general interpretation of what a lien is. However, there are various types of lien, each with a different added element to the general definition described above. (See 28 *Halsbury Laws of England* (4th Ed) at para 501.)

The 'lien' in s 2 of the Bankruptcy Act 1967 under the definition of 'secured creditor' has the added element of an existing debt. It expressly states that it must be the property of a debtor and it must be for security of a debt. It is of a specific category and not of the general type as defined in the *Osborne Law Dictionary*. This must be the intention of Parliament when enacting s 2 of the Bankruptcy Act 1967 for, if it is intended to cover a lien of a general nature, then there is no necessity to add the qualifying words relating to debt and debtor. By this addition, it restrict the 'lien' under this section to a situation where a debt must exist and it does not apply to just a security for the performance of an obligation.

A After examining the memorandum of deposit and the facts as disclosed in the affidavits of this case, I find no elements of a debt owed by the applicant company to the respondent at the time when this memorandum of deposit was executed. This being the case, the respondent could not be holding the memorandum of deposit as a security for a debt to qualify them as 'secured creditors'.

B There were attempts by respondent's counsel to argue that subsequently a debt existed between the applicant company and the respondent when the applicant company defaulted in their rental payments. This would trigger off the memorandum of deposit and turned it into a lien with an element of a debt. However, this argument does not overcome the fact that when the C debt came into existence, presumably in December 1990 when the respondent repossessed the equipment, the petition for winding up the applicant company had already been presented and a winding-up order made. As the respondent was not a 'secured creditor', the set-off made three years after this winding-up order must be void under s 223 of the Act as it was made after the commencement of the winding up of the applicant D company. It was also void under s 293 of the Act for undue preferential payment to creditors. The sum must now be returned to the liquidator for his necessary action.

Learned counsel for the respondent cited to me the judgment of Haidar J in *Agimal Industries Sdn Bhd v United Malayan Banking Corp Bhd & Anor*,[2] E where it was held that a fixed deposit receipt held by a bank who had issued a guarantee, qualified the bank to be a 'secured creditor' within the definition of s 2 of the Bankruptcy Act 1967. I am of the view that this judgment so cited differs from the facts of the present case and, should be distinguished on this ground.

F I hereby accordingly allow the liquidator's application (encl 3) with costs.

Application allowed.

Reported by Jeanne Tan

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